CIRCUIT COURT OF OREGON
Fifteenth Judicial District

RICHARD L. BARRON
Judge

Coos County Courthouse
Coquille, Oregon 97423
(541) 396-4095

November 13, 2012

Ms. Marianne Dugan
Attorney at Law
259 E. 5th Ave., Ste. 200-D
Eugene, OR 97401

Mr. Stephen Dingle
Senior Asst. County Counsel
125 E. 8th Ave.
Eugene, OR 97401

Re: Handy v. Lane County et al., 16-12-13685

Counsel:

Plaintiff filed a complaint containing three claims for relief:

1. Public Meetings Law—Violation of emergency meeting rules;
2. Public Meetings Law—Quorum meeting and deciding without public notice; and
3. Public Meetings Law—Injunction

Plaintiff asks this court under his first claim for relief to declare that defendants violated the public meeting law by violating the law regarding emergency meetings, and under his second claim for relief to declare that defendants violated the public meetings law by meeting in private without proper notice to make a decision to respond to a public records request to disclose a document relating to allegations against plaintiff. The third claim for

relief asks the court for an injunction against defendants to prevent future violations of the public meeting law.

Defendants timely file a special motion to strike under Oregon's Anti-SLAPP law, ORS 31.150. They also filed a motion to strike and to make more definite and certain allegations in the complaint. In his response to defendants' motions, plaintiff asked leave to amend his complaint and requested an opportunity to pursue discovery. Since the court believes the motion to strike under ORS 31.150 is dispositive, it will address it first, but will later discuss the other motions so the record is complete.

When an ANTI-SLAPP motion is filed, the court must first determine if a challenged cause of action arises from protected activity covered by the ANTI-SLAPP statute and if it does, it then must determine whether the plaintiff has shown a probability of winning its claim. *Navellier v. Sletten*, 124 Cal Rptr 2d 530 (2002). ORS 31.150 (2) protects oral and written statements made in a governmental proceeding authorized by law, or in connection with an issue before a governmental body, or presented in public in connection with an issue of public interest, or other conduct in furtherance of the right to free speech in connection with a public issue. A public official or governmental body may file an ANTI-SLAPP motion. *San Ramon Valley Fire Protection District v. Contra Costa County Employees' Retirement Association*, 22 Cal Rptr 3d 724, 731 (Cal App 2004).

Although plaintiff's complaint is somewhat confusing as to what he claims, he clarified it during oral argument before the court. As to the first claim for relief, he stated it was based on the failure of defendants to give reasons for an emergency meeting held on May 3, 2012, violating ORS 192.640(3), and as to the second claim for relief that a quorum of the county commissioners, the three individually named defendants, met in private during the May 3, 2012 emergency meeting, violating ORS 192.630(1) and(2), and decided to release for aforementioned letter, and met on May 2, 2012 to deliberate toward a decision to release the aforementioned letter, again violating ORS 192.630(1) and (2). "Decision" and "meeting" are defined in ORS 192.610 (1).

The emergency meeting plaintiff refers to in the first and second claims for relief was on May 3, 2012, during which, as stated in the preceding paragraph, a decision was made to release a letter making allegations against plaintiff.

The gravamen of plaintiff's complaint is the decision to release the letter regarding allegations against plaintiff. He asks that that decision be invalidated

in the first two claims for relief because of the alleged procedural deficiencies. Do the claims for relief arise from protected activity covered by ORS 31.150?

The answer is "yes." Plaintiff filed his complaint after the May 3, 2012 meeting and although that alone is not enough to demonstrate that the lawsuit is a SLAPP lawsuit, it is a factor the court can consider. *See San Ramon Valley Fire Protection District v. Contra Costa County Employees' Retirement Association, supra*, at 22 Cal Rprt 731. The court relies on three cases[1] from California, the state from which the Oregon legislature borrowed its ANTI-SLAPP law in making its decision. The first case is *Tuchscher Development Enterprises, INC.*, 132 Cal Rptr 2d 57 (Cal App 2003). In *Tuchscher* the plaintiff had an exclusive negotiating agreement with a city to develop a property, but never reached an agreement because plaintiff claimed the defendants interfered with the city negotiating with plaintiff because defendants wanted to develop the property in question. The alleged interference came in the form of talking to the mayor of the city and other city representatives and arranging meetings between defendants and the city. Defendants moved to strike the claims under California's ANTI-SLAPP law and the lower court granted the motion. In deciding that the activity was protected activity, the court pointed out that the activity consisted of communications about a public issue affecting the community.

The court further stated that the fact that plaintiff did not intend to chill speech was irrelevant to the court's analysis and that plaintiff's arguments that defendants' conduct was wrong misses the point of the initial inquiry the court must make because such a contention relates to plaintiff's burden of showing it is likely to prevail in the case.

The second case is *San Ramon Valley Fire Protection District v. Contra Costa County Employees' Retirement Association, supra*, a case involving a retirement board increasing the contribution rates for employee benefits of a fire protection district. The decision to increase the rates came after a meeting of the board at which the method used to determine the contribution amount was discussed and at another meeting where the board refused to reconsider its determination. After the meeting plaintiff district filed a lawsuit alleging the board failed to do

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[1] Defendants cite and rely on the case of *Acker v. Ontario*, 2006 WL 540888 (Cal App 4th District) because the fact situation is similar to the facts in this case. The court does not rely on the case because it is an unpublished opinion and California Rule of Court 8.1115 states that an unpublished opinion may not be cited or relied upon by a court or party in any other action. There are two exceptions to the rule, but they are not applicable in this case. Further, when Westlaw is used to retrieve the case, it has a red flag indicating it is no longer good law on a particular point of law and there does not appear to be a way for the court to find what that point of law is.

its mandatory duty in regards to increasing the rates and in refusing to reconsider its decision.

The board argued that its action fell within California's ANTI-SLAPP law. In rejecting that argument the court stated "'[t]he [anti-slapp] statute's definitional focus...[whether] the defendant's activity *giving rise to his or her asserted liability*...constitutes protected speech or petitioning.'" 22 Cal Rptr 3d at 731. Increasing rates of contribution had nothing to do with speech even though the lawsuit came after the meeting at which the rates were increased. Acts of governance mandated by law, without more, are not exercises of free speech or petition. '[T]he defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or speech.'" *Id.* Finally, the court wrote at *ID.* 734:

"As noted, the Board was not sued based on the content of speech it has promulgated or supported, nor on its exercise of a right to petition. The action challenged consists of charging the District more for certain pension contributions than the District believes is appropriate. This is not governmental action which is speech-related. By contrast, if the action taken by the Board had been to authorize participation in a campaign to amend state pension laws, or to become actively involved in a voter initiative seeking such changes, then the Board's own exercise of free speech might be implicated. But this is not the case, and this distinguishing feature is dispositive of the Board's argument."

The last case is *Holbrook v. City of Santa Monica*, 51 Cal Rptr 3d 182 (2006). In *Holbrook* plaintiffs sued defendant alleging because public comment could not be made until the end of city council meetings which ran so late that the public was deprived of its right to address its local representatives. In upholding the trial court's decision to grant the anti-slapp motion, the court noted that all four subsections (basically the same as Oregon's) of the ANTI-SLAPP law were implicated in plaintiffs' lawsuit and the criteria of each were met. Plaintiffs, nevertheless, argued that two of their claims under California's public meetings law were not implicated because they claimed that they were not seeking to curtail the city council's right to speak, but only seeking to require that public comment must be finished by 11:00pm at night. The court pointed out that this was contrary to plaintiffs' complaint which sought to require the city council to complete and adjourn its meetings by 11:00pm.

Plaintiffs in *Holbrook* next argued that they, like the plaintiff in the *San Ramon* case, were only attempting to remedy "'the City's defective attempt to comply with mandatory duties imposed by the Government Code, not speech.'" *Id.* at 186. The court reiterated that the gravamen of plaintiffs' lawsuit was the late night meetings and not the procedural elements of holding a meeting.

As this court pointed out above, the gravamen of plaintiff's complaint is the decision on May 3, 2012 to release the letter making allegations against him. He asks that that decision of the defendants be voided, a request that is inconsistent with his argument that he is only attacking the procedural deficiencies of setting the emergency meeting, setting forth the reasons for the emergency meeting, or what happened during a discussion the day before the emergency meeting.

Plaintiff's argument is really part of its burden to establish he will likely prevail even though the court has decided that his claims for relief are subject to ORS 31.150. Further, this is not the type of case where plaintiff is merely seeking to require defendants to follow the mandate of an act of governance. It is directly attacking the discussion and decision made by defendants regarding an issue of public interest, i. e., a letter making allegations about plaintiff. That attack is on defendants' right to speech.

The third claim for relief is the request for an injunction against future violations of the public meetings law. The court believes the third claim for relief is dependent on the first two claims and since they are being dismissed, the third claim will also be dismissed.

Plaintiff contends that even if the court decides, as it has, that his complaint is subject ORS 31.150, he has shown that he is likely to prevail on his claims and cites Judge Michael Gillespie's decision in the Lane County circuit court case of *Dumbi v. Handy*, No. 16-10-02760. That decision is part of the record in this case. It is sufficient to state that under any interpretation of the *Dumbi* decision, plaintiff has not shown he is likely to prevail.

Although allowing the motion to strike under ORS 31.150 leads to dismissal without prejudice of plaintiff's complaint, the court will address the other motions or requests filed by the parties to make a complete record.

If plaintiff's complaint was not being dismissed, the court would allow defendants' motion to strike paragraphs 28-37 of plaintiff's complaint because they are alleged in paragraph 17 and are, therefore, redundant and unnecessary.

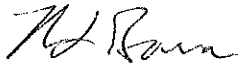
The court would also allow defendants' motion to make paragraph 39 more definite and certain because there are no allegations the court can find in the complaint that point to any ongoing violations of the public meetings law. The case brought by plaintiff relates only to decisions made by defendants that led to the disclosure of a public record relating to allegations against plaintiff.

Defendants' motion to make more definite and certain plaintiff's second claim for relief would be denied because it is clear to the court that it only relates to decisions concerning the disclosure of a public record making allegations against plaintiff.

The court will not allow plaintiff to amend his complaint because it does not believe that plaintiff can plead a case that does not implicate ORS 31.150, and because it does not believe it is likely plaintiff would prevail on his claims for relief, there is no reason to allow further discovery; therefore, the request to allow further discovery is also denied.

Mr. Dingle is to prepare an order dismissing plaintiff's complaint without prejudice. The order should also deny plaintiff's motion to amend his complaint and for discovery. Since the other decisions by the court regarding the motions to strike and to make more definite and certain under ORCP 21 were for record purposes only, there does not need to be an order entered at this time as to those motions.

Sincerely,



Richard L. Barron
Presiding Judge